IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA Plaintiff V. DOUGLAS EDWARD BATTI, Defendant	Cr. No. 91-00594 DAE

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

On February 26, 1991, Douglas Edward Batti arrived at the Honolulu International Airport on a Continental Airlines flight #003 from Los Angeles where he had been for two days. Upon disembarking at the front of the line from the airplane and walking briskly from the terminal, Mr. Batti was stopped for questioning by DEA Agent Joyce Alapa. Ms. Alapa asked Mr. Batti a few questions regarding where he had been and where he was heading and requested to examine his plane ticket. She noticed that Mr. Batti was nervously shifting his weight from one foot to the other and that his hand were shaking. She advised Mr. Batti that she was investigating narcotics trafficking and asked if he was carrying narcotics. When he responded negatively, Agent Alapa asked if she could look through his bag. Again giving a negative response,

Mr. Batti picked up his bag and clutched it to him. The defendant was then informed that if he did not give the agent permission to conduct the search, that she would detain the bag in order to put a narcotics detecting dog on it. When Mr. Batti told Agent Alapa to put the dog on the bag, she took the bag to the DEA Task Force Office to wait for the dog. Mr. Batti and Agent Alapa's partner, Agent Ohia, followed. The dog "alerted" to the bag indicting that the dog smelled narcotics and Mr. Batti was placed under arrest. The incident of detaining the bag was said to have taken approximately twenty minutes.

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in a public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983). However, to determine if a police officer's questioning constitutes an investigative detention, as opposed to a consensual encounter, the applicable standard is whether a reasonable person in the circumstances of the defendant would have believed himself not free to leave. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980). Mr. Batti acknowledges that he willingly stopped to answer Agent Alapa's questions. It is unclear though whether the defendant felt restricted by Agent Alapa's ensuing interrogation. The record reflects that Agent Alapa singled out Mr. Batti when he disembarked from the plane and caught up to him to ask if he minded being questioned. Once engaged in conversation with the defendant, the agent advised the defendant that she was investigating drug related activities. The entire time Agent Alapa was speaking with Mr. Batti, Agent Ohia was standing ten feet

behind the defendant. When the defendant refused to let Agents Alapa look in his bag, she asked if Agent Ohia could do the inspection. After the defendant's further refusal, Agent Alapa advised him that she would detain the parcel for examination. This court believes that given those particular circumstances a reasonable person in defendant Batti's position would not have felt free to leave. See, United States v. Patino, 649 F.2d 724, 727 (9th Cir. 1981) ("the officers had definitely identified her as a suspect and . . . the manner in which she was stopped conveyed an air of authority indicating that she was not free to leave"); accord, United States v. Palen, 793 F. 2d 853, 857 (7th Cir. 1986) ("the person, once told he is a suspect, no longer feels free to leave the scene of the questioning").

Law enforcement officers are not precluded from effecting an investigative detention, however, a detention and search beyond a routine stop may be undertaken only upon a "reasonable suspicion" justified by a particularized and objective basis for suspecting the particular person of a crime. United States v. Carreon, 872 F.2d 1436, 1440 (10th Cir. 1989). The Supreme Court in Terry v. Ohio. 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968) promulgated the "reasonable suspicion" standard by stating that the detaining officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search or seizure]," in order for the search to be valid. Id. The two-part test announced in Terry to determine whether the less rigorous "reasonable suspicion" standard has been met is as follows. First, the search and seizure must be justified by reasonable suspicion at the inception of the intrusion. Second, the search and seizure must be reasonably related in scope to the circumstances justifying the intrusion in the first instance. Id, 392 U.S. at 20, 88 S.Ct. at 1879. Here,

Agent Alapa did not have reasonable suspicion to confiscate Mr. Batti's carry-on luggage. By Agent Alapa's own admission at the hearing, Mr. Batti did not fit any "drug courier profile." The information that Agent Alapa elicited from Mr. Batti upon questioning was not so unusual that the officers could reasonably infer that the defendant possessed drugs among his personal belongings. Many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stop-over periods. Often these same passengers use luggage belonging to a friend. Furthermore, any reasonable person could be expected to exhibit signs of nervousness when confronted by a police officer for questioning in a public place. Arrival from a "source city" and having little or no luggage are characteristics which "describe a very large category of presumably innocent travelers" and are insufficient to justify a seizure. Reid v. Georgia, 448 U.S. 438, 441 (1980). That defendant Batti manifested all of these characteristics provides no grounds for suspecting wrongdoing. For law enforcement officers to base a search, even in part, on a hunch as Agent Alapa conceded to doing at the hearing, stretches the concept of reasonable suspicion beyond recognition.

It is unfortunate that the defendant, who was actually transporting drugs, should be able to escape the consequences of his illegal activities. However, the need to protect the sanctity of the Constitution's prohibition against unreasonable searches and seizures sometimes occasions inequitable results. Without strict adherence to the letter of the Fourth Amendment, arbitrary, harassing detentions of innocent air travelers could be predicated on mere hunches of law enforcement officers.

The court finds that the detention of Mr. Batti and the seizure of his carry-on luggage were not supported by a

reasonable articulable suspicion. Therefore, any evidence found in the defendant's bag would be deemed fruits of the poisonous tree.

Accordingly, for the foregoing reasons, the defendant's motion to suppress the evidence is hereby GRANTED.

So ordered.

DATED: Honolulu, Hawaii, May 29, 1991.

/s/
SAMUEL P. KING
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellant V. DOUGLAS EDWARD BATTI, Defendant-Appellee	)	No. 91-10318 D.C. No. CR-91-00594-SPK-0 MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Submitted March 11, 1992**

Before: CHOY, FARRIS and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The district court suppressed the heroin found in Batti's bag based on a determination that the seizures of both Batti and his carry-on bag were not supported by a reasonable, articulable suspicion. The government now appeals, arguing first that Batti himself was not seized and, second, that even if Batti were seized, the seizures of both Batti and the carry-on bag were justified by a reasonable suspicion.

While we review the district court's findings of historical facts under the clearly erroneous standard, "the ultimate determination of whether those facts amount to an unlawful seizure is a matter of law that we review de novo." United States v. Johnson, 903 F.2d 1219, 1221 (9th Cir.), cert. denied, 111 S. Ct. 520 (1990); see also United States v. Mines, 883 F.2d 801, 803 (9th Cir.), cert. denied, 493 U.S. 997 (1989). Additionally, review de novo the district court's determination as to whether the law enforcement agents had a reasonable and articulable suspicion to justify a Terry stop. United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989); United States v. Ayarza, 874 F.2d 647, 649-50 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990). We now reverse and remand.

I. Seizure of Batti

The district court found that Batti was seized at some point in the questioning process. To the extent the district court determined that Batti was seized prior to being informed by Agent Alapa that she was either going to search his bag right there in the airport or take it back to the office for a dog sniff, we disagree.

In determining if an officer's actions constituted a seizure, we ask "whether the person stopped reasonably believed that he or she was not free to leave." Johnson,

903 F.2d at 1221. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). The Supreme Court recently reaffirmed that "mere police questioning does not constitute a seizure." Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991).

Under these standards, Batti was not seized prior to being informed that his bag would be either searched or dog sniffed. When Agent Alapa approached Batti, she merely identified herself and asked Batti if she could ask him some questions. Agent Alapa never displayed her weapon, commanded Batti to submit to questioning, or physically restrained Batti. At this point, a person in Batti's position would reasonably have believed that he was free to leave. See generally United States v. Brown, 884 F.2d 1309, 1310-11 (9th Cir. 1989), cert. denied, 493 U.S. 1025 (1990) (no seizure when detectives approached defendant in a public place, did not display weapons, touch defendant, or restrain him in any way, spoke in a non-threatening manner, and told defendant that he was free to go); Ayarza, 874 F.2d at 650-51 (no seizure when trooper approached defendant, identified himself, told defendant that he was free to leave, and then proceeded to question defendant).

The district court further held that, at the point in time when Batti was informed that his bag would be either searched or dog-sniffed, Batti was seized. We need not determine whether a seizure occurred at this point, however, because even if Batti were seized, that seizure was justified by reasonable suspicion.

In determining whether the agent has a reasonable suspicion supported by articulable facts sufficient to justify an investigatory stop, we consider "the totality of the

circumstances - the whole picture." United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The agents must have "some minimal level of objective justification" for the seizure. Id. at 7 (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)); see also Hernandez-Alvarado, 891 F.2d at 1416.

The agents' seizure of Batti was supported by reasonable suspicion. Batti arrived in Honolulu after a two-day trip to a drug-source city, Los Angeles. He exited the airplane in a hurry and told Agent Alapa that he was rushing to catch his connecting flight. This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half. Batti also was unable to produce his ticket when asked to do so by Agent Alapa. Furthermore, after being questioned by Alapa, Batti began to act nervous and his hands began to shake. Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body, and stepped a couple of paces away from Alapa.

These facts, when viewed "in the light of a trained officer's experience," Hernandez-Alvarado, 891 F.2d at 1416, indicate that Agents Alapa and Ohia had reasonable suspicion to justify an investigative stop of Batti. See generally Sokolow, 490 U.S. at 8-10 (when taken together, evidence of suspect traveling under an alias or taking an evasive path through airport, failing to check luggage, paying cash for tickets, making only a two-day trip to Miami, and acting extremely nervous is sufficient to establish reasonable suspicion); United States v. Low, 887 F.2d 232 (9th Cir. 1989) (that suspect purchased ticket with cash under an alias, appeared nervous, and

failed to check luggage was sufficient to establish reasonable suspicion).

In reaching this conclusion, we are mindful of the Supreme Court's admonition in Reid v. Georgia, 448 U.S. 438, 441 (1980), that reasonable suspicion cannot be based on circumstances or characteristics which "describe a very large category of presumably innocent travelers." When considered as a whole, Batti's conduct was not so consistent with the probable conduct of "a very large category" of innocent travelers as to vitiate the presence of reasonable suspicion.[1]

II. Seizure of Batti's Carry-On Bag

Agent Alapa seized Batti's bag when she informed Batti that she would either search the bag there in the airport or take it to the office for a dog sniff. For the same reasons we determined there was reasonable suspicion to support Batti's seizure, Agent Alapa had a reasonable suspicion to justify this seizure.

REVERSED AND REMANDED

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1. We also realize that Batti should not be penalized for the exercise of his constitutional right not to consent to a search. It was not Batti's refusal to consent to a search, however, that formed the basis for the agents' reasonable suspicion. Rather, it was his rapid exit from the plane, his implausible explanation, his nervousness, and the manner in which he refused consent which properly formed the basis for a reasonable suspicion. See, e.g., United States v. Riley, 927 F.2d 1045, 1050 (8th Cir. 1991) (when determining whether detective had reasonable suspicion, court looked at defendant's "sharp change in attitude" when he withdrew his permission to have his luggage searched.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 91-10318
Plaintiff	)	
	)	
V.	)	D.C. No.
	)	CR-91-00594-
DOUGLAS EDWARD BATTI,	)	SPK-0
	)	
Defendant	)	**ORDER**
	)	

Before: CHOY, FARRIS and RYMER,
Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Farris and Rymer have voted to reject the suggestion for rehearing en banc. Judge Choy so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KING'S FINDINGS

1. NO FINDING

2. Many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stop-over periods. (Pg. 4)

3. "The information that Agent Alapa elicited from Mr. Batti upon questioning was not so unusual that the officers could reasonably infer that the defendant possessed drugs among his personal belongings." (Pg. 4)

4. NO FINDING

5. "[A]ny reasonable person could be expected to exhibit signs of nervousness when confronted by a police officer for questioning in a public place." (Pg. 4)

6. Alapa asked if she could look through his bag. Again giving a negative response, Mr. Batti picked up his bag and clutched it to him. (Pg. 1)

7. "By Agent Alapa's own admission at the hearing, Mr. Batti did not fit any drug carrier profile." (Pg. 4)

8. "For law enforcement officers to base a search, even in part, on a hunch as Agent Alapa conceded to doing at the hearing, stretches the concept of reasonable suspicion beyond recognition. (Pg. 4)

(NO REASONABLE SUSPICION)

PANEL'S FINDINGS

1. "[Batti] told Agent Alapa that he was rushing to catch his connecting flight." (Pg. 4)

2. "This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half." (Pg. 4)

3. OMITTED

4. "Batti also was unable to produce his ticket when asked to do so by Agent Alapa. (Pg. 4)

5. OMITTED

6. "Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body and stepped back a couple of paces away from Alapa.

7. OMITTED

8. OMITTED

(REASONABLE SUSPICION).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Code, Section 1254(1) states:

> Cases in the courts of appeals may be reviewed by the Supreme court by the following methods:
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> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

The Federal Rules of Criminal Procedure, Rule 12(e) states:

> (e) **Ruling on Motion.** A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.